STATE OF MAINE
PUBLIC UTILITIES COMMISSION

March 10, 2003

ORDER

MEP MANAGEMENT SERVICES, INC.
Appeal of Conservation Selection Service
Provider Proposal #RFP-EE-0202

Docket No. 2003-23

MAINE PUBLIC UTILITIES COMMISSION
Interim Electric Conservation Programs

Docket No. 2002-161

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

Through this Order, we conclude that the contract award to L.K. Goldfarb Associates (LKGA) to serve as implementation contractor for the Commission's interim small business energy efficiency program was not in violation of the law, and that the solicitation and selection processes were neither fundamentally unfair, nor arbitrary and capricious. We accordingly decline to alter the contract award decision.

II. BACKGROUND

During its last session, the Legislature enacted P.L. 2001, ch. 624 (Conservation Act), directing the Commission to implement a statewide electric energy conservation program. The Act requires the Commission to develop and implement individual programs that are consistent with the goals and objectives of an overall conservation strategy to be established by the Commission. P.L. 2001, ch. 624, § 4.

In enacting the Conservation Act, the Legislature recognized that the process of developing and implementing a statewide electric energy conservation program pursuant to requirements of the Act would necessarily take a substantial amount of time. Accordingly, to avoid delay in the offering of programs, the Legislature authorized the Commission to implement interim programs. Section 7 of the Conservation Act states:

> **Interim programs.** In order to avoid a significant delay in the implementation of conservation programs pursuant to the Maine Revised Statutes, Title 35-A, Section 3211-A, the Public Utilities Commission may use funds from the conservation program fund established pursuant to Title 35-A, section 3211-A, subsection 5 to implement on a short-term basis conservation programs that the commission finds to be cost

effective. The commission is not required to satisfy the requirements of Title 35-A, section 3211-A before implementing such programs.

In response to this legislative provision, the Commission, on June 13, 2002, issued an Order that established several interim programs. *Order Establishing Interim Conservation Programs*, Docket No. 2002-161 (June 13, 2002) (*Interim Programs Order*). As part of that Order, the Commission staff was directed to further investigate other programs, including one directed to Maine's small businesses.

On September 24, 2002, the Commission issued an Order that established an interim program for small business. *Order Establishing Interim Conservation Program – Small Business Program*, Docket No. 2002-161 (Sept. 24, 2002) (*Small Business Order*). That Order specified that the goal of the program would be to improve the efficiency of energy use in small business applications and that the program objectives would be to:

- Reduce inefficient electricity consumption by small business customers.
- Increase the number of Maine suppliers and contractors selling energy efficient products and services to small business customers.
- Increase small business customer awareness of the benefits of energy efficiency and their use of energy efficient products.

Id. at 4. The Order directed Commission staff to implement the small business program and delegated to the Director of Energy Efficiency Programs the authority to conduct a competitive solicitation process to select an implementation contractor.

On September 26, 2002, Commission staff issued a Request for Proposal (RFP) for purposes of selecting an implementation contractor. At the conclusion of the solicitation process, LKGA was chosen to serve as the small business program's implementation contractor.

On January 7, 2003, MEP Management Services Inc. (MEP) "appealed" the contract award of LKGA. By Procedural Order issued January 14, 2003, the Commission's legal advisor for conservation matters issued a procedural order explaining that the MEP "appeal" would be treated as a request for reconsideration of a Commission decision pursuant to the Commission's procedural rules (Chapter 110, § 1004). Because the reconsideration of a bid selection decision is not a delegated matter, the procedural order stated that the request for reconsideration would be decided by the Commission. The procedural order also stated that the Commission would either uphold or vacate the selection decision. In the event the selection decision were vacated, the Commission would not make a new selection decision, but would either require that the existing bids be re-evaluated or would direct that a new solicitation process be initiated.

On January 21, 2003, MEP filed a Motion for Change of Hearing Examiner, asking that the Commission's legal advisor for conservation matters not be involved in the resolution of its appeal. As grounds for its Motion, MEP stated that the Commission's legal advisor had played a significant role in the small business solicitation and selection process. On January 29, 2003, the Commission's General Counsel issued a letter stating that the legal advisor's role was so minimal as to not affect his impartiality. Nevertheless, the General Counsel assigned an alternative Presiding Officer for purposes of the reconsideration process to avoid any appearance of unfairness.

On January 21, 2003, MEP filed a request for disclosures of confidential information relating to the bid process. MEP had previously been provided all non-confidential information pursuant to a Freedom of Information request. On January 29, 2003, the Presiding Officer denied the request, as permitted by 35-A M.R.S.A. § 1311-A(1)(D), upon concluding that the release of confidential bid material to a competing bidder would have a chilling effect on the Commission's effort to secure the best conservation programs for Maine's public. On February 10, 2003, MEP filed an appeal to the Commission of the presiding officer's ruling. The Commission responded by asking LKGA to provide more detailed grounds for not disclosing the material. On February 13, 2003, LKGA filed a letter withdrawing its request for confidential treatment, and the material was then provided to MEP.

On February 10, 2003, the Presiding Officer issued an Advisor's Recommended Decision and on February 24, 2003, MEP filed Comments in Response to the Advisor's Recommended Decision.

III. DISCUSSION

A. Standard of Review and Review Process

For purposes of our review of the solicitation and selection process at issue in this proceeding, we will apply the appeal criteria contained in the Bureau of General Services, Division of Purchases rules for the appeals of contract and grant awards (18-554 CMR Chapter 120). We thus review the process to determine whether there were any violations of law, or any irregularities creating fundamental unfairness, or whether the contract award was arbitrary or capricious. In doing so, we consider whether the process resulted in one bidder's having gained an unfair advantage over another or whether there was no rational basis for the contract award.[1] Our review is based on the small business program bid materials and the written submissions of MEP.

---

[1] These are essentially the standards that MEP stated should be applied in this case. MEP Petition at 2.

MEP argues that it is entitled to, and should be afforded, an adjudicatory hearing, stating that there are certain factual matters that remain in dispute. MEP does not, however, provide any authority supporting a legal right to an adjudicatory hearing in this case.[2] Additionally, there appears to be no real disagreement as to the underlying facts; rather, the disagreement is about the legal significance to be accorded to those facts. Such a disagreement does not warrant an adjudicatory hearing to resolve.

MEP also argues that an "internal review" by the Commission is highly problematic and that a review by a disinterested agency, such as the Bureau of Purchasing, should occur to safeguard the integrity of the contracting process. The Conservation Act, however, contains an explicit exemption regarding use of the Bureau of Purchasing selection procedures. 35-A M.R.S.A. § 3211-A(3)(C) This reflects a legislative intent that the process of selecting conservation providers occur within the Commission's own internal processes. Moreover, the review process employed in this case is analogous to the type of independent review that would occur under the Bureau of Purchasing rules. The contract award in this case was made by the Commission's Director of Energy Efficiency Program, with the assistance of a Review Committee. The Commissioners were not at all involved in the initial selection process and, as a result, the Commission is not engaged in a review of its own decision.[3]

B. Statutory Requirements Associated with Interim Small Business Program

MEP claims that that the contact award was in violation of law in that the bidding and selection process did not comply with statutory requirements. Specifically, MEP argues that the Commission failed to adopt rules to govern the bid process and that the process failed to adhere to statutorily mandated criteria for selecting qualified bidders, including preference to in-state service providers. MEP adds in its Comments to Advisor's Recommended Decision that the Commission disregarded the "cost effectiveness" statutory requirement for interim programs by failing to show that the small business program has the potential to promote sustainable economic development. For reasons discussed below, we conclude that the solicitation process and the resulting contract award did not violate any statutory requirements.

---

[2] MEP cites only to the definition of "adjudicatory proceeding" in the Administrative Procedure Act, 5 M.R.S.A. § 8002(1), and the Commission's procedural rules, Chapter 110, § 105(a), which basically state that adjudicatory processes must be employed when required by constitutional law or statute. MEP did not cite to any constitutional or statutory provision that would require an adjudicatory hearing in this case.

[3] There has been no allegation that the Commissioners themselves have any personal, professional or financial conflict of interest regarding the small business program selection process. On the contrary, the Commission's only institutional interest regarding this matter is the implementation of the best possible small business conservation program.

To address MEP's claims that the selection process was in violation of law, it is necessary to review the statutory requirements for interim conservation programs as opposed to "permanent" programs under the Conservation Act. First, the Legislature set up a two-phase process in directing the Commission to establish conservation programs. Section 4 of the Conservation Act directs the Commission to develop and implement electric energy conservation programs that are consistent with the goals and objectives of an overall energy conservation program strategy that the Commission must establish. The programs must be cost effective, according to a definition that the Commission also must establish. Various other statutory directives require the Commission to promulgate rules and hold public hearings.

However, the Legislature recognized that the process of developing the rules, goals, objectives and strategies for the longer-term conservation program and the actual implementation of the "permanent" individual programs pursuant to those rules, goals, objectives and strategies would necessarily take a substantial amount of time. The Legislature understood that if the Commission were required to develop a set of rules prior to the initiation of interim programs, those programs would be unlikely to have any substantial effect before the end of 2003 when the interim programs must be replaced by permanent programs. Accordingly, the Legislature afforded the Commission substantial flexibility to implement interim programs quickly by explicitly stating in Section 7 of the Act that the Commission is not required to satisfy the requirements of the Act for "permanent" programs in the implementation of interim programs. *See Interim Programs Order* at 2; *Small Business Order* at 1-2.

Nevertheless, in adopting a series of interim programs, the Commission decided to choose a portfolio of interim programs that meet the statutory criteria in the Conservation Act "to the greatest extent possible." *Interim Programs Order* at 6. With respect to the interim small business program, the Commission noted that at least three of the criteria for "permanent" programs would be satisfied: (1) availability to small businesses (35-A M.R.S.A. § 3211-A (2)(B)(2)); (2) selection through competitive bidding (35-A M.R.S.A. § 3211-A (3)(A)); and (3) to the extent practical, encouragement of the development of resources, infrastructure and skills in Maine by giving preference to in-state service providers (35-A M.R.S.A. § 3211-A (3)(B)). The Commission described the third criterion as being met because the "design of the program calls for delivery of services through a network of allies, comprising participating Maine contractors and suppliers (HVAC contractors, electrical contractors, electrical and lighting supply stores, HVAC suppliers, etc.)" *Small Business Order* at 5.

1. <u>Failure to Adopt Regulations</u>

With this background, we now address MEP's claims that the selection process was in violation of law due to the lack of rules governing the solicitation and selection process, and that the Commission's failure to proceed with a rulemaking prior to the issuance of the RFP resulted in a lack of clarity and confusion as to the objectives of the program and the process. As explained above, the Conservation Act explicitly exempts interim programs from the requirement that the

Commission adopt rules establishing procedures governing the selection of service providers.[4] Thus, although we agree with MEP that the selection process must not be arbitrary or fundamentally unfair, the lack of promulgated rules governing the bid and selection process was not in violation of law. The reason the Legislature set up a different process for interim programs was a concern with time. Interim programs by statute only operate through December 2003, so the Legislature did not require the entire panoply of requirements of full-scale programs for interim programs.

Additionally, we disagree with MEP's position that the absence of rules caused a lack of clarity or confusion. We also disagree with MEP's suggestion in its Comments to Advisor's Recommended Decision that there were no procedural requirements regarding the selection process.[5] The RFP provided the details of the selection process and there has been no indication of any significant confusion regarding the process. Information regarding the required tasks, the skills of the contractor and the selection process was equally available to all potential bidders through the relevant Commission orders, the RFP, the Pre-Bid Conference and posted questions and answers on the Commission's website. The only example of a lack of clarity cited by MEP was the absence of a clear definition of "small business." However, a definition of small business for purposes of the program was provided in the RFP (page 2, footnote 2).[6]

We note that if MEP found the objectives and process lacking in clarity, it had ample opportunity to raise questions while its bid was still being prepared. MEP's failure to do so until after it was not awarded the contract not only raises doubt

---

[4] We further note that the Commission under Section 7 of the Act is also not required to competitively bid interim programs, but chose to do so with regards to the interim small business program. We disagree with MEP's suggestion that, once a decision to use a competitive bid process was made, we were obligated to abide by any particular body of rules, such as those of the Division of Purchasing.

[5] MEP states in its Comments to Advisor's Recommended Decision that the Presiding Officer concluded that there need not be any rules or procedural requirements for competitive solicitations regarding interim conservation programs. This is incorrect. The Advisor's Recommended Decision stated only that there is no legal requirement for the Commission to promulgate rules governing competitive selection processes for interim programs, a conclusion that is a correct statement of the law.

[6] The RFP noted that the definition of small business was under consideration in a then pending rulemaking, Docket No. 2002-473, but for purposes of the RFP "small businesses" are firms that employ 50 or fewer full-time equivalent employees. In determining the qualifications of a business as small, the sum of all employees at all locations will be used. A number of questions and answers posted on the website also dealt with the definition. The definition in the RFP is essentially the definition included in the rule when it was adopted on November 6, 2002.

as to whether and to what extent MEP really viewed lack of clarity as a problem, but it also precluded our staff from clarifying any real points of uncertainty on a timely basis.[7]

2. Failure to Provide Preference to In-State Service Providers

MEP argues that the selection process failed to comply with a statutorily required preference for in-state service providers. As explained above, the interim conservation programs are not subject to the statutory requirement applicable to "permanent" programs that the Commission give preference to in-state providers.[8] Therefore, there can be no violation of this provision of the Conservation Act.

Although not required by statute, the Commission's small business solicitation actually did provide an in-state preference consistent with the policy of the Conservation Act. In its Order establishing the small business program, the Commission stated that preference would be given to in-state providers in that the program design calls for the delivery of services through a network comprising participating Maine contractors and suppliers. *Small Business Order* at 4. Consistent with the Commission's direction, the small business RFP included "Maine economic impact" among the specified criteria for bid evaluations. This criterion, which allocated up to 10 out of a possible 100 points, was described in the RFP as "encourage[ment] [of] the development of resources, infrastructure and skills within the State." This criterion included the use of in-state service providers and thus a preference for in-state service providers. Accordingly, there would be no violation of an in-state preference even if there were such a requirement in law.

3. Cost Effectiveness Requirement

MEP argues that the "cost effectiveness" standard contained in Section 7 of the Act for interim programs requires a finding that the small business program will promote sustainable economic development. MEP misinterprets the legal requirement for a cost effectiveness finding.

MEP is correct that Section 7 of the Conservation Act requires a finding that interim conservation programs will be cost effective. However, MEP is incorrect as to the statutory definition of cost effectiveness. MEP argues that a conclusion that a program is cost effective requires a finding that it has the potential to promote sustainable economic development. However, the Conservation Act states:

---

[7] Although we do not agree that there was any serious lack of clarity in this bid process, we emphasize that in the future, if a bidder believes there are problems of this nature, it would be well advised to raise them before it loses the bid and while they can still be remedied.

[8] There is actually no requirement that preference always be given to in-state providers. The Conservation Act states only that preference should be given "to the extent practicable." 35-A M.R.S.A. § 3211-A(3)(B).

> Conservation programs implemented by the commission must be consistent with the objectives and an overall energy strategy developed by the commission and be cost effective, as defined by the commission by rule or order. In defining "cost effective," the commission may consider the extent to which a program promotes sustainable economic development or reduces environmental damage to the extent the commission can quantify or otherwise reasonably identify such effects.

35-A M.R.S.A. § 3211-A(2). The key phrase in this provision is "may consider." There is no mandate that we take into account sustainable economic development in determining cost-effectiveness. Rather, the provision permits the Commission to include on the benefits side of the cost-effectiveness calculation economic development and environmental benefits to the extent that they can be reasonably identified and quantified.

The basic determination of cost effectiveness is much more straightforward than argued by MEP. The requirement is for a finding that the value of the energy savings produced by the program is reasonably likely to exceed the program cost. *Interim Programs Order* at 61-65. We made the requisite finding prior to the issuance of the small business RFP. *Small Business Order* at 4.

In contrast to MEP's position, the cost effectiveness test has little to do with where the conservation funds are expended. MEP's discussion of sustainable economic development puts too much emphasis on the physical location of the bidder. The primary goal of promoting sustainable economic development is not to sustain local conservation contractors through payments from the conservation fund; this could not be the case for interim programs since funds cannot be committed beyond the end of this year. Rather, the goal of sustainable economic development is fostered by programs that promote economic development in the target market (i.e., Maine small businesses). Thus, it is not the contractors who are to be sustained, but rather the businesses to whom the contractors are to offer services.

C. Selection Process

MEP alleges that the selection process employed by the Commission's Review Committee was fundamentally unfair and led to an arbitrary and capricious contract award. Essentially, MEP's arguments are based on the view that the proposals were reviewed inconsistently and were not properly scored against the appropriate selection criteria.

As mentioned above, we review the bid and selection process to determine whether it was fundamentally unfair or arbitrary and capricious. We consider whether the process resulted in one bidder having gained an unfair advantage over another and whether there was no rational basis for the contract award. Thus, in this review, we seek to determine only whether there were any fundamental flaws in the process that would warrant either a re-scoring of the bids or a new bid process. We do not review the bids or scoring to determine whether an award to an alternative bidder could be justified or even whether we might have chosen a different bidder. It may very well be the case that rational reviewers could have chosen an alternative bidder than that selected by the Review Committee. Our focus is instead on whether there was a sufficient basis to support the contract award and whether there were any serious irregularities or fundamental flaws that jeopardized or compromised the integrity of the process to such a point that fundamental fairness is implicated.

1. Overall Consistency

At the outset, we note that the Commission's small business solicitation set forth general guidelines and requirements of a program and explicitly sought proposals for the design and implementation of a small business program. As a consequence, bidders were free to propose a variety of approaches to the development of a small business program. Small Business RFP at 3 – 6 . Thus, by its nature, the Commission's solicitation necessitated an evaluation based primarily on sound judgment. The Commission delegated this exercise of judgment to its Review Committee,[9] which comprised professionals with substantial experience and expertise with electricity efficiency programs, including programs directed at small business. It is the exercise of this judgment by the Review Committee that MEP questions in this case.[10]

The small business RFP sought an "Implementation Contractor" that would be:

> responsible for overall program implementation, including marketing and education, ally outreach and support services, and incentive review and processing services for this program. The selected contractor will work with Commission staff to finalize the design of this program, including developing a marketing and education plan for this program. The contractor will then implement the program plan, including the production of marketing and education materials. The contractor will also recruit and train contractors and suppliers to participate in the program as Allies and provide on-going support to these allies.

[9] As mentioned above, the Commission delegated its authority to conduct the bid process and enter contracts to its Director of Energy Efficiency Programs. *Small Business Order* at 5.

[10] MEP's allegations of conflicts of interest and bias among Committee members will be addressed below.

Small Business RFP at 3-4. The evaluation system contained in the RFP was scored on a scale of 0-100 points, based on the following criteria:

- Previous experience and qualifications – 40 points
- Responsiveness to the solicitation – 25 points
- Costs – 25 points
- Maine economic impact – 10 points

Small Business RFP at 9 – 11. Each Review Committee member individually scored the proposals and tabulated the results. These results were then combined in a composite score for each bidder. The results were presented along with a description of the merits of each proposal in the Review Committee's evaluation memorandum. *See* Petition for Reconsideration, Attachment H.

The Review Committee ranked LKGA first with 80 points and MEP sixth with 60 points (two points lower than the fourth place bidder). The comparative rankings among the Committee members were consistent. Each ranked LKGA first, while MEP was ranked between fifth and seventh. The individual total rankings were similarly consistent for the other five bidders.

LKGA was ranked first by all Committee members on experience and qualifications, the most highly valued category (40 points). LKGA was also consistently ranked very high in the responsiveness category (20 points). MEP was ranked high in the price category (25 points) and first in the Maine economy category (10 points).

A review of the rankings illustrates that the contract was awarded to LKGA to a large degree because the Review Committee was of the unanimous opinion that the LKGA bid was superior in the category of experience and qualifications, which was weighted heavily in scoring process. LKGA also ranked high in responsiveness. MEP ranked high in Maine economic impact, but this category was weighted relatively low in the scoring process.

The overall consistency of the ranking by the individual committee members dispels the notion, as generally argued by MEP, of a seriously inconsistent review process that amounted to fundamental unfairness and an arbitrary and capricious contract award. We thus do not find an overall inconsistency or illogic in the ranking that would cause us to question the fairness of the review process and the reasonableness of the results. Moreover, our review of the LKPA and MEP bids does not lead us to question the basic scoring of the Review Committee or the ultimate results of the solicitation.[11]

[11] In its Comments to Advisor's Recommended Decision, MEP states that if an additional review of the bids occurred, it should have been provided all materials or notes related to this review under its Freedom of Access request. It is important to point

2. Individualized Irregularities

We move next to MEP's cited examples of inconsistencies or lack of support regarding the evaluation process. MEP notes the following in support of its arguments:

- One reviewer gave the winning bidder a relatively high score for "labor in Maine" even though two key personnel of the winning bidder devoting from 43% to 65% of their time to the contract, are employed by an out-of-state company.

- MEP's own comparison of its bid against that of the winning bidder concluded that there was little material difference between the two proposals, and that there were certain areas in which its proposal was more responsive than that of the winning bidder.

- The winning bidder had the most unfavorable allocation of incentives in its initial proposal, its costs were $400,000 greater than those of MEP, and there was no demonstrated comparison as to "leveraged funding."

- The winning bidder was given an opportunity to "correct deficiencies" in its original bid through a second round of review.

We address each of the MEP examples below.

MEP questions the relatively high ranking of the winning bidder on a "labor in Maine" sub-category on the grounds that two key personnel work for an out-of-state company. The point of this category is to give weight to the degree to which the bidder's proposal would positively impact Maine's local economy and infrastructure. The RFP asked proposers to indicate which members of the team would be located in Maine and the number of hours they would devote to the project and what other Maine resources would be used in implementation. Given the broad nature and degree of economic activity associated with the small business proposals, the location of the headquarters of the company that employs two of the key personnel appears to be of little relevance.

MEP used its own comparison of its bid with that of LKGA to assert that the ranking in the responsiveness category was faulty. As mentioned above, we are reviewing the selection process only to determine whether it was fundamentally

---

out that there was no formal re-scoring of the bids, but rather that bids were reviewed to the extent deemed necessary to evaluate and decide MEP's points on appeal. We need not decide whether MEP would be entitled to the notes or other materials from such review, as there are no such notes or other materials.

unfair or arbitrary or capricious in nature. The fact that someone could rank the proposals in a way that produced a different result from that of the Review Committee could be expected and does not bear on whether the actual selection process was rational and internally consistent.

MEP's claim that LKGA was scored inappropriately high in the cost category (19 out of 25 points, tied for fourth among the 7 bidders), based on its view that the LKPA initial bid contained the most unfavorable allocation of incentives and was more costly than its bid, is not an indication of a serious flaw in that the evaluation of cost involves numerous considerations (e.g., overall price, budget allocation, price per kWh, leveraged funding).

MEP argues that LKGA was given an unfair opportunity to "correct deficiencies" in its initial bid through a second round of reviews. The Review Committee, to obtain more details on certain aspects of the bids, invited the top three bidders for further discussions. These discussions included the feasibility of altering the proposed programs to better satisfy the overall goals and objectives. We see nothing inherently unfair or arbitrary in this process. Moreover, the RFP specifically provided for such discussions and thus was known to all bidders at the outset of the process.[12] The Review Committee, exercising its judgment, chose the proposals demonstrating the greatest promise and arranged for further discussions to gain a greater understanding of the proposals and conduct discussions about possible changes in some aspects of the program.

---

[12] The RFP states on pages 10-11:

As part of its evaluation, the Commission reserves the right to take any of the following steps, either with respect to all of the proposals received, or to a subset of proposals selected as superior to the other:

- Consult with prior clients on the performance of firms or particular persons proposed for this program;
- Schedule presentations or interviews with representatives of the firms or persons proposed for this program;
- Conduct a review of past performance, including reports, materials, analyses, or other materials that would reflect on the proposer's performance; and
- Request additional data or material to support proposals from any or all bidders.

The Commission anticipates making one award under this solicitation, but reserves the right to select multiple contractors to fulfill the requirements of this program. The Commission may award a contract based on the proposals received, without discussion, or may conduct limited discussion or negotiations. Proposals should be submitted using the most favorable technical and cost terms.

Our review of MEP's examples of inconsistencies do not indicate the existence of irregularities sufficient for us to question the fundamental fairness of the process or the legitimacy of the results.

3. Scoring Methodology

MEP argues that the scoring methodology used in the selection process disproportionately weighted prior experience in the provision of energy efficiency services. MEP states that, because the small business program was intended to stimulate and support the development of local infrastructure for energy efficiency services, the intent was for the winning contractor to have a skill set that went beyond the delivery of energy efficiency services.

MEP appears to be disputing both the reasonableness of the point allocation in the scoring process, as well as the judgment of the Review Committee in the particular scoring of the winning bidder in some areas. As noted above, the RFP established a scoring system in which previous experience and qualifications in implementing energy efficiency programs was allocated 40 out of 100 points. Although points could have been allocated differently, we find nothing in the RFP scoring system to indicate that it was contrary to the stated goals and objectives of the small business program. Considerations cited by MEP (such as education, marketing and coordinating services) were adequately addressed in other scoring categories (primarily the "responsiveness to the solicitation" category). The fact that MEP may have allocated or awarded points differently does not indicate that the process used by the Review Committee was fundamentally flawed in any way.

In its Comments to Advisor's Recommended Decision, MEP argues that the scoring documentation failed to adequately substantiate the selection. To support its argument, MEP states that there are scoring sheets from only two reviewers and some portions of the scoring sheets are not completed. Additionally, MEP states there are some factors included on the scoring sheets that were not in the RFP and others that were in the RFP but not on the scoring sheet.

MEP is correct that a particular scoring sheet was not used by all the reviewers. However, we disagree with MEP's conclusion that the evaluation and scoring of the bids were not adequately documented. Each reviewer individually scored each bid on each category listed in the RFP. Some reviewers apparently made use of a particular scoring sheet, while others recorded their impressions on handwritten notes or individually produced tables. Although it may have been preferable for all reviewers to use a single scoring sheet, the absence of a uniform scoring sheet does not render the process illegal or fundamentally unfair. Similarly, minor inconsistencies between a scoring sheet and the discussion in the RFP, does not constitute a fundamental flaw in process.

4. Review Committee Composition

As noted above, the Review Committee was composed of Commission staff members with extensive experience in energy efficiency matters including small business programs. MEP points out that the RFP stated that the Review Committee would comprise Commission Staff and "selected outside reviewers." MEP assumes that this statement was included in recognition that this would be a new program for the PUC, that it would require a contractor with a different skill set, and that because the Commission staff is small, it would be difficult to find the expertise to impartially evaluate the submitted proposals. MEP concludes that the use of outside reviewers was mandatory and that the failure to name outside reviewers was material and detrimental to the process.

We disagree. MEP is mistaken as to the reason the RFP references "selected outside reviewers." This reference was not included because of any concern that the necessary expertise might not exist among the staff to adequately and impartially evaluate the bids. The Commission has hired an energy efficiency staff whose sole responsibility is to implement programs under the Conservation Act. In addition, the Commission staff contains other members with substantial experience in this area. The reference to outside reviewers was included in interim program RFP to provide Commission staff with the option of employing outside reviewers if it were determined to be desirable. We acknowledge that the RFP conveys the impression that the review team would include outside reviewers. However, the RFP's failure to specify that the use of outside reviewers would be optional does not amount to a fundamental flaw in the selection process, nor can we find any provision of law that would require that the Commission use outside reviewers in selecting conservation contractors.

5. Conflict of Interest

MEP argues that several members of the Review Committee had inherent conflicts of interest. Specifically, MEP asserts that prior professional and official connections between the winning bidder and its partners and members of the Review Committee raise a substantial concern about the ability of the Committee to conduct an impartial review. MEP points to members of the Committee who worked with the winning bidder or its partners in previous employment situations and notes that one member of the Committee was listed as a reference for the winning bidder. Because of the unique nature of the RFP, MEP asserts that the natural tendency was to evaluate the bids with a predisposition to favor former business contacts. MEP does not allege that any member of the Committee had any pecuniary interest in the contract award. Rather, the argument is more in the nature of the existence of an appearance of impropriety and that prior business contracts may have led to a sub-conscious predisposition in favor of the winning bidder.

In addressing MEP's argument, we first consider whether it would be appropriate to adopt a *per se* rule that any previous business connection with a potential bidder would disqualify an individual from serving on a review committee. We believe such a *per se* rule would be unwise in this context. Maine is a small state and there is a limited amount of in-state expertise in the energy efficiency industry. As individuals change employment, it is common for former employees to interact in different roles, representing different interests. In fact, one member of the Review Committee had prior professional contacts with several of the other bidders or their partners in the small business solicitation. Any type of *per se* rule that would prevent qualified members of the Commission staff from serving on a committee to review energy efficiency proposals would be contrary to the public interest in that it would lead to less qualified reviewers and inferior energy efficiency programs.

The issue of a Review Committee member being named as a reference for the winning bidder is moot in this case, because the named individual did not actually review the bids or participate in the selection process.[13] Nevertheless, we decline to adopt a policy whereby a reviewer is disqualified simply because he or she has been named as a reference. In contrast to the type of "reference" that might be provided when an individual applies for employment, the inclusion of client references in the winning bid was in compliance with the RFP's requirement that bids describe specific relevant experience. RFP at 8-9. In the current case, the named reference was the Commission's contact person for previous customer communications work that the bidder performed for the Commission. We disagree with MEP's presumption that a named reference in this context would favor any bidder or that the inclusion of such an individual on a bid review committee implicates the credibility or fundamental fairness of the process.[14] A reference such as in the current case means only that the named individual is familiar with previous relevant work experience of the bidder. Rather than requiring disqualification, it is sensible for the Commission to include individuals with prior knowledge of the quality of relevant work performed by a bidder to act as a reviewer in that he or she would have first hand knowledge of both the strengths and weaknesses of the bidder.[15] Moreover, any rule requiring the disqualification of

---

[13] That individual was on paternal leave during the selection process.

[14] In its Comments to Advisor's Recommended Decision at 6-7, MEP states that allowing a named reference to serve on a bid review committee is "identical to a situation where a member of the review committee withholds the fact that they would be financially benefited by a decision under the committee's determination and then proceeds to vote on this decision without disclosure." We find it difficult to respond to MEP's assertion in this regard other than by stating that a view of the two circumstances as "identical" is outside the bounds of logic and obviously with any merit. To ensure that the record is absolutely clear on this point, no member of the Commission or the Review Committee has any financial interest whatsoever in the outcome of the small business solicitation.

[15] Indeed, MEP separately complains about the review committee's lack of expertise. It thus attacks the process because the reviewers had both too much and too little familiarity with the activity that was the subject matter of the RFP.

individuals named as references would have the undesirable effect of providing bidders with the ability to alter the composition of review committees by simply naming references, an action over which neither the Commission or the named individual would have any control.

Having concluded that it is inadvisable to automatically disqualify reviewers who have had prior business contacts with potential bidders, we review the bid process in the current case to determine whether there are any actual indications that the results were tainted in any way by any conflicts of interest or bias among Review Committee members. We have reviewed all the material submitted by MEP and find no indication that any conflict or bias impacted the process or the results. As discussed above, the individual reviewers were relatively consistent in the scoring of the bids. Moreover, there is absolutely no indication of any favoritism towards the winning bidder.[16]

In its Comments to Advisor's Recommended Decision, MEP states that it is not proposing a "per se" rule, but rather that the Commission could have addressed the situation through disclosures and the use of outside reviewers. In retrospect, it would have been preferable to disclose any prior business relationships that members of the Review Committee had with bidders. However, in the absence of any indication of motive for favoritism, the lack of disclosures do not constitute a fundamental flaw in the process that would warrant either a re-score or a re-bid. We disagree with MEP that the use of outside reviewers would have been necessary to address the prior professional relationship matter in that only one of four members of the Review Committee had such a relationship. Thus, even if that member's participation were negated to a large degree by disregarding his scores, the outcome of the bid evaluation would be unchanged.

For these reasons, we reject MEP's position that the contract award should be overturned on the grounds of conflict or bias.

D. Stay

In its Comments to Advisor's Recommended Decision, MEP states that, in the absence of a decision to re-bid the small business contract, it assumes that a stay of the contract award will continue pending exhaustion of its appeal rights. Although there has been no formal stay of the contract award, there was an informal understanding that the contract would not be executed until the Commission rules on the matter. Now that we have considered the matter, we decline to stay the contract award.

The Commission may consider a request for a stay pending an appeal pursuant to 35-A M.R.S.A. § 1320(7). Before a stay is granted, the party requesting a stay must demonstrate:

[16] It is worth noting that in a previous energy efficiency bid solicitation involving a reviewer as to whom MEP claims bias, LKGA did not win the contract award.

- a likelihood of success on the merits;
- an irreparable injury if the stay is not granted;
- a balance of harms such that the irreparable injury outweighs any harm caused to other parties by granting the stay; and
- the public interest favors granting the relief.

Ingraham v. University of Maine, 441 A.2d 691, 693 (Me. 1982); *Investigation of Authority of Kennebunk Light and Power District to Provide Service in Certain Portions of Kennebunk*, Docket No. 95-148 (Aug. 14, 1997).

For all the reasons discussed above, MEP is not likely to succeed on the merits. It does not have a reasonable probability of demonstrating that the Commission committed legal error in finding that the bid process was not unlawful, fundamentally unfair, or arbitrary and capricious. MEP has not indicated what irreparable injury it would suffer in the absence of a stay, but it is clear that a stay of the contract would harm the public by delaying implementation of the small business conservation program. This harm is likely to be irreparable because any further significant delay in the program implementation will make it impossible to fulfill the program goals by December 31, 2003 as required by statute. If this were to occur, the interim program would not be implemented and Maine's small businesses would be completely deprived of its intended benefits. Thus, we conclude that the harm to the public out-weighs any harm that might occur to MEP and that accordingly the public interest does not favor the granting of a stay.

V. CONCLUSION

MEP's petition for reconsideration in this matter reveals that it has a disagreement with the granting of the contract award to the winning bidder. MEP believes that too much emphasis in the process was given to actual prior experience by bidders in the delivery of energy efficiency services and programs, and too little weight was given to other criteria for which MEP believed itself to be a stronger candidate (e.g., marketing and coordinating services to Maine's small businesses).

However, we review the solicitation and review process only to determine that it complied with statutory requirements and that there were no fundamental flaws in the process or irregularities in the scoring that would be unlawful, implicate fundamental fairness, or lead to an arbitrary or capricious contract award. We do not review the process to determine whether a contract award to an alternative bidder could be rationally justified. Our review indicates that a fair scoring and rating process was established in the RFP and that the Review Committee followed that process. The review of the bids was conducted in a fair manner and no bidder was provided an unfair advantage over any other. We also conclude that, based on the bid materials, there was a rational basis for the Review Committee's scoring and contract award, and no indication that the process was at all affected by any type of bias or conflict of interest. Accordingly, we decline to overturn the Review Committee's contract award in this case.

Dated at Augusta, Maine, this 10th day of March, 2003.

BY ORDER OF THE COMMISSION

____
Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.